United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

Original

76-1115

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76-1116

To be argued by
MICHAEL LESCH

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

JAMES E. CORR, III, et al.,

Defendant-Appellant.

On Appeal from a Judgment of the United States District Court for the Southern District of New York.

BRIEF FOR DEFENDANT-APPELLANT JAMES E. CORR III

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket Nos. 76-1115 and 76-1116

UNITED STATES OF AMERICA,

Appellee,

-against-

JAMES E. CORR, III,

Defendant-Appellant.

DEFENDANT-APPELLANT JAMES E. CORR, III'S BRIEF

PRELIMINARY STATEMENT

After a five-week jury trial, defendant James E. Corr, III ("Corr") was convicted of conspiring to violate the securities and mail fraud statutes (18 U.S.C. § 371) of unregistered sales of securities (15 U.S.C. § 77e) of securities and mail fraud (15 U.S.C. §§ 77q(a) and 78j(b) and 18 U.S.C. § 1341), of making false statements on a bank loan application (18 U.S.C. § 1014); of perjury (18 U.S.C. § 1623); and of making false statements before the Securities and Exchange Commission ("SEC") (18 U.S.C. § 1001). Co-defendant Roger Drayer was convicted of conspiracy, securities fraud, and mail fraud. The jury was unable to reach a verdict as to co-defendant Barry Drayer and was discharged.

On March 5, 1976, judgments of conviction were entered against the appellant herein which imposed concurrent sentences of imprisonment for two and one half years and, as to the conspiracy count, a fine of $10,000 (363a, 364a).*

ISSUES PRESENTED FOR REVIEW

1. Did the trial court's exclusion of certain evidence offered by the appellant prevent him from presenting a full defense to the charges against him, thereby unconstitutionally impairing his right to a fair trial?

2. Should counts two through nine of indictment 75 Cr. 803 (EW), charging the appellant with unregistered sales of securities, have been dismissed for insufficient evidence that appellant was a "control person"?

3. Should counts four, six, seven, and ten of indictment 75 Cr. 1059 (EW), charging the appellant with making false statements before the SEC have been dismissed on the grounds that the false statements alleged therein were either unresponsive or met the "literal truth" requirement of Bronston v. United States, 409 U.S. 352 (1973)?

4. Did the trial court err in including the Pinkerton charge in its instructions to the jury and in marshaling the evidence?

5. Did the trial court err in admitting evidence

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* Numbers in parentheses followed by "a" refer to the appendix; preceded by "Tr." to the transcript; and preceded by "Ex." to government's exhibits. Letters preceded by "Ex." refer to defendant Corr's exhibits.

concerning allegedly "similar acts" on the part of the appellant?

SUMMARY OF THE INDICTMENTS

James E. Corr, III was initially indicted only under indictment 75 Cr. 803 (EW). This indictment charged him with conspiracy (count 1), unregistered sales of securities (counts 2 through 9), violations of the antifraud provisions of the Securities Act of 1933 (count 11), violations of the antifraud provisions of the Securities Exchange Act of 1934 (counts 12 through 22), mail fraud (counts 23 through 33), making a false statement in a bank loan application (count 34), perjury (counts 35 and 36), and making false statements before the SEC (counts 37 through 42).

The object of the conspiracy alleged was to fraudulently manipulate transactions in the common stock of Jerome Mackey's Judo, Inc. ("Judo") which was traded over-the-counter. Indicted with Corr were R. Bruce Buschbaum ("Buschbaum"), Roger Drayer, Barry Drayer, Barry Chajet ("Chajet"), Allan Kern ("Kern"), William Murphy ("Murphy") and Richard Sobel ("Sobel"). By the time of trial, Buschbaum, Chajet, Kern, Murphy, and Sobel had entered into agreements with the government under which they pled guilty to a single felony charge. All of these individuals testified for the government. While Corr was the only defendant not employed in the securities industry, the government has consistently maintained that he was the central figure in the alleged conspiracy, coordinating and directing the activities of the other individuals indicted.

The conspiracy was alleged to have begun on or about June 1, 1971 and to have extended until the end of June 1973. Among the means allegedly employed in furtherance of the conspiracy were guarantees against loss to investors in Judo stock, orders directed by Corr to and from marketmakers in Judo stock, "parking" of Judo stock for the purpose of avoiding sales into the market, a "payoff" by Corr to codefendant Sobel and co-conspirator Daniel Salant for the purpose of causing them to solicit investors to purchase Judo securities, sales of Judo stock by Corr from accounts he controlled but which were in others' names, a fraudulent "stock swap" of shares of Judo for shares of Health Delivery Systems, Inc., placing of "wooden tickets" (buy orders for Judo securities which could not be paid for) at various brokerage firms, and the fraudulent opening of bank and brokerage accounts.

On October 7, 1975, counts 35 through 42 of indictment 75 Cr. 803 (EW) (the perjury and false statement counts) were dismissed. Subsequently, indictment 75 Cr. 1059 (EW) was filed. This indictment charged Corr with perjury (count 1) and making false statements before the SEC (counts 2 through 12). Counts three and five of this indictment were dismissed prior to trial. The two indictments were consolidated for trial.

At the conclusion of the government's case, counts eighteen, twenty,* and twenty-six of indictment 75 Cr. 803 (EW) and count eight of indictment 75 Cr. 1059 (EW) were dismissed (Tr. 3353, 3358).

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* The judgment of conviction as to Indictment 75 Cr. 803 incorrectly indicates that Corr was also convicted on Count 20 (363a).

Corr takes this appeal from his conviction on the remaining counts submitted to the jury.

THE EVIDENCE

Jerome Mackey's Judo, Inc.

James E. Corr, III, 37 years of age at the time of trial and a high school graduate (Tr. 3439), met H. Jerome Mackey ("Mackey") in August 1970 and in early 1971 entered into a contract of employment with Judo (Tr. 3451).

Mackey had founded Judo, in 1958 (92a) to give instruction in the martial arts. By the time Corr joined it in 1971, Judo was well established and had had substantial income for a number of years (Tr. 177-182). At all times relevant to this case, Mackey, an unindicted co-conspirator, was the chief operating officer of Judo (108a-110a), owned a majority of Judo's outstanding shares and was able to elect the entire board of directors (110a-113a). The evidence regarding Mackey's control of Judo is fully set forth in point II, infra.

Corr's principal duties for Judo related to the company's franchise program which he designed (Tr. 72). Initially franchises were set up in Florida as a joint venture of Judo and another corporation. When the joint venture failed, Corr purchased the Florida franchises (Tr. 3504) and subsequently became a substantial investor in both Judo stock and Judo franchises.* Eventually the Florida franchises were moved to New York where they remained under Corr's ownership (Tr. 3505).

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* Corr was prevented by various rulings of the trial judge from presenting evidence as to the full extent of his investment in Judo. See point IA infra.

After a public offering in late 1971, Judo's common stock was publicly traded. With the transfer of the Florida franchises to New York in 1972, Corr's duties for the corporation came to include responsibility for the company's relations with the financial community and its public shareholders.

Brokers and Registered Representatives

Upon Corr's transfer to New York, he contacted Buschbaum, a broker at the New York Stock Exchange firm of Sterling Grace & Co., Inc. ("Sterling Grace") to determine whether Sterling Grace would be willing to make a market in Judo common stock (Tr. 3630-3634). Sterling Grace began making a market in the stock in early 1972. Buschbaum, a government witness at trial, testified that orders for Judo stock were directed to him by Corr (Tr. 418-549). Corr testified that on occasion various individuals asked him where they could purchase Judo stock, and he recommended the Sterling Grace firm. He denied that such recommendations were made as part of a scheme to control trading in the stock, asserting that he believed that as the sole New York Stock Exchange member firm making a market in the stock, Sterling Grace provided the best execution of individual orders (Tr. 3655-3658).

Buschbaum also testified to certain "parking" transactions he engaged in with co-defendant Murphy, an employee of the brokerage firm of Piper, Jaffray and Hopwood & Co., Inc. in Minneapolis. Both Buschbaum (Tr. 575) and Murphy (Tr. 1854) testified that Corr had no prior knowledge of these transactions.

Corr testified that the sales of Judo stock that were the subject of counts two through nine of indictment 75 Cr. 803

(charging him with unregistered sales of securities) were part of the arrangement by which Sterling Grace undertook to become a market maker in the stock (Tr. 3648-3649). Corr acknowledged that he sold stock from time to time when necessary to meet the demand by Sterling Grace customers, but maintained that he was overall a heavy net purchaser of Judo stock. Corr was however prevented by various rulings of the trial judge from presenting evidence as to the full extent of his investment in Judo stock. See Point IA infra.

Corr acknowledged that he made optimistic forecasts to brokers (Tr. 3682-3689) and private investors (Tr. 3665-3667) when inquiries were directed to him regarding the company's prospects. Denying fraudulent intent, however, Corr maintained that such predictions were based on his sincere belief in the company's prospects as evidenced by his own heavy investment in Judo stock and franchises. His predictions regarding the company's prospects were no more optimistic than predictions appearing at the same time in respected financial publications (Ex. U, W).

Several broker witnesses testified that Corr had transfer sheets and computer printouts indicating the holders of Judo stock. Corr acknowledged possession of the computer printouts but denied that they indicated fraudulent intent to manipulate the price of the stock. He maintained, based on his prior experience with publicly held companies, that preparation of such printouts was a legitimate method of analyzing the distribution of stock of

the company and thereby obtaining a listing of the stock on a national securities exchange (Tr. 3747-3750). Corr further acknowledged that he told brokers that he knew who all the Judo shareholders were because of the 104,000 shares outstanding, 70,000 shares were owned by ten people (Tr. 3746).

Among the registered representatives with whom Corr discussed the prospects of Judo were co-defendant Sobel and un-indicted co-conspirator Daniel Salant ("Salant"). Sobel and Salant conducted their brokerage business on a partnership basis. These two individuals provided the sole testimony in the case alleging a "payoff" by Corr to a broker to sell Judo stock. Their testimony and the restrictions imposed by the Court on the cross-examination of Sobel are fully discussed in Point IE, infra. Corr denied that he offered these individuals a payoff (Tr. 3756).

rr's Family

Corr's former wife, Kathleen Newberry, his brother Raymond Corr and his half brother Joseph Sonberg testified for the government. The prosecution contended that Corr had fraudulently opened brokerage accounts in these individuals' names to conceal his ownership of the stock in the accounts. Corr contended that while he exercised a high degree of discretion in managing the investments of his family, the individual family members had opened the accounts in question, frequently with funds owed to them by Corr (Tr. 3765-3794; 3830-3845).

Events of September through November 1972

As part of its market making activity in Judo, Sterling Grace had arranged to have Judo common stock listed on NASDAQ

(Tr. 614). NASDAQ is an automated quotation system for stocks traded over-the-counter. On September 8, 1972, Mackey was informed that because Judo had fewer than 500 shareholders it was about to be delisted from NASDAQ (government exhibit 130). Mackey informed Corr of the imminent delisting and requested Corr's assistance to retain the listing (Tr. 149).

To increase the number of Judo shareholders, Corr sought the assistance of a number of brokerage firms, which thereafter distributed stock from present holders of large blocs of shares to new shareholders (Tr. 3695-3702). While a number of firms participated in this effort, Morgan, Kennedy & Co., Inc. ("Morgan Kennedy") played the most prominent role.

Prior to the distribution and since early 1972 Morgan Kennedy, principally through one of its registered representatives co-defendant Chajet, had been making a market in Judo stock (Tr. 1173-1174). When Corr contacted Morgan Kennedy in connection with his efforts to increase the distribution of Judo stock, he met with, among others co-defendant Allan Kern, a principal of the firm.

Kern proposed a "swap" by shareholders of Judo of their shares for shares of Health Delivery Systems, Inc., a Morgan Kennedy underwriting, held by customers of that firm (Tr. 2246). Corr discussed the proposed swap with Mackey and Peter Davis, outside counsel to Judo (Tr. 3709). Corr testified that Davis told him that he thought Corr should go ahead with the proposed swap (Tr. 3710) and that based on this advice, Corr had no doubts as to the legality of the transaction. Corr testified that Davis had in the course of discussions on the subject of a distribution stated that the stock of control persons of Judo could not be distributed but,

although he knew that Corr intended to include some of his stock in any distribution, Davis never mentioned the possibility that Corr might be a control person (Tr. 3712-3713).

Howard Bergtraum, Davis' associate,* testified that he did not know that Corr intended to distribute his shares and (over objection) that he told Corr that he was a control person of Judo (322a-323a). Bergtraum did not contradict Corr's testimony that he told Judo's attorneys about the proposed stock swap.

The stock swap, carried out as proposed, was the subject of count eleven of indictment 75 Cr. 803 (EW) which charged Corr and Kern with violation of 15 U.S.C. §§ 77q(a), 77x. It was also alleged to be one of the means used to further the conspiracy (Count 1, par. 4(1)). Corr contended that his reliance on the advice of counsel in entering into the swap negated any fraudulent intent on his part.

The government maintained that to stem Judo's stock price decline in October and November 1972, Corr and co-defendant Roger Drayer fraudulently placed "wooden tickets" (purchase orders of Judo stock that could not be and were not in fact paid for) at various brokerage firms. Roger Drayer was a principal of the brokerage firm of Fingerhut & Co., Inc. and a general partner of an investment partnership, Jenny Associates, in whose name some of the wooden tickets were allegedly placed. The wooden ticket evidence is discussed in Point V infra. Although he acknowledged that he attempted to assist Roger Drayer in meeting his obligations

* It was stipulated that Davis if called would testify similarly to Bergtraum (Tr. 4917-4919).

to the brokerage firms where Drayer had placed orders (Tr. 3846- 3885), the appellant Corr contended that except as to the alleged wooden ticket at Margolis & Co. no evidence was presented indicating that he participated in the placing of or had any prior knowledge of the placing of wooden tickets. As to the Margolis wooden ticket, the testimony of Corr (Tr. 3886-3890) and the principal of Margolis & Co. (Tr. 1774-1777) was sharply conflicting.

The Ventura Group

After November 1972, in the prosecution's view, the conspiracy took a new turn involving with the exception of Corr, a new cast of characters. The prosecution alleged that Corr with the assistance of Barry Drayer, Roger Drayer's brother, attempted to use the funds of a group of Barry Drayer's clients to run up the price of Judo stock. Barry Drayer was a registered representative and investment advisor. The group of clients involved (hereinafter referred to as the "Ventura group") consisted of Raphael Ventura, a Chilean investor; Dr. Isaac Cohen, an orthopedic surgeon and Raphael Ventura's cousin; Jose Cohen, Isaac Cohen's brother; and Dr Lester Van Ess, a surgeon. The prosecution alleged that Corr with the assistance of Barry Drayer opened brokerage accounts in the names of these individuals at th firm of Raymond James & Associates, Inc. in St. Petersburg, Florida and bank accounts in their names at the First Commercial Bank of St. Petersburg. The prosecution contended that beneficial ownership and control of the accounts rested with Corr.

As is discussed in Point IA, infra, Corr was prevented by a ruling by the trial court from fully explaining his financial transactions with the members of the Ventura group. Corr contended that the Ventura group joined with him in an attempt to buy control of Judo from Mackey; that in support of this effort, Corr loaned funds to members of the group to be used to purchase Judo stock; and that when the members of the group failed to repay the loans, Corr assumed their stock purchases.

The False Loan Application

Count thirty-four of indictment 75 Cr. 803 (EW) charged Corr with violating 18 U.S.C. §1014 in making false statements to the Underwriters Bank & Trust Co. for the purpose of influencing the bank to extend a $20,000 loan. The false loan application was also alleged to be an overt act in furtherance of the conspiracy (Indictment, par. 5(h)). The evidence produced in connection with this loan application is discussed in Points ID and IG, infra.

The SEC Investigation

The SEC suspended trading in Judo stock on May 10, 1973. That agency then conducted an investigation into trading in the stock at which Corr testified. As is discussed in Point IB, infra, Corr was not permitted to introduce an SEC release terminating the suspension on August 24, 1973 and finding that Corr was not a control person of Judo.

POINT I

THE TRIAL COURT'S EXCLUSION OF EVIDENCE, BY PREVENTING APPELLANT FROM PRESENTING A FULL DEFENSE TO THE CHARGES, UNCONSTITUTIONALLY IMPAIRED HIS RIGHT TO A FAIR TRIAL

The trial judge, principally through the exclusion of certain highly relevant evidence, severely limited Corr's ability to present an effective defense. The limitations discussed herein are (A) exclusion of testimony by Corr's accountant Lewis Braff ("Braff") relating to Corr's investment in Judo; (B) exclusion of a release of the SEC regarding the SEC's investigation of trading in Judo securities; (C) exclusion of evidence relating to Mackey's pending sentence for mail fraud in the Eastern District of New York; (D) exclusion of testimony by John Coyne ("Coyne") and Corr regarding the relationship of Leroy and Jean Goldfarb to the Underwriters Bank & Trust Co. ("Underwriters Bank"); (E) exclusion of testimony by Sobel relating to the reasons for his retraction of his testimony before the SEC regarding an alleged "payoff" by Corr; (F) exclusion of testimony by by Barry Chajet ("Chajet") as to whether he had been the subject of an investigation by the SEC; and (G) failure to require the government to make available to the defense material relating to the testimony of Coyne.

The right to present a full defense is a fundamental element of due process of law deriving from the Sixth and Fourteenth Amendments. Chambers v. Mississippi 410 U.S. 284, 302 (1972); Webb v. Texas 409 U.S. 95 (1972); Washington v. Texas 388 U.S. 14 (1967); In re Oliver, 333 U.S. 257, 273 (1948); United States v. Thomas 484 F. 2d 334, 335 (6th Cir. 1973);

Johnson v. Johnson [illegible] F. Supp 872, 876 (W.D. Mich. 1974) ("The Sixth Amendment was adopted to foreclose the government's application of English rules which prevented certain criminal defendants from calling witnesses in their own behalf"); State of Wisconsin v. Gagnon 497 F.2d 1126, 1129 (7th Cir. 1974). See Argersinger v. Hamlin, 407 U.S. 25, 33 (972); Groppi v. Leslie, 404 U.S. 496, 502 (1972); Escoe v. Zerbst, 295 U.S. 490, 493 (1935) ("Clearly the end and aim of an appearance before the court must be to enable an accused...to explain away the accusation. The charge against him may have been inspired by rumor or mistake or even downright malice. He shall have a chance to say his say before the word of his pursuers is received to his undoing."); Snyder v. Massachusetts, 291 U.S. 97, 105 (1934); Powell v. Alabama, 287 U.S. 45, 68 (1932); Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat) 518, 581 (1819) (argument of Daniel Webster - "By the law of the land is most clearly intended...a law which hears before it condemns."); United States v. Freeman, 514 F.2d 1314, 1318 (D.C. Cir. 1975).

For example, in Webb v. Texas, supra, the Supreme Court found an unconstitutional impairment of the ability to present an effective defense when the trial judge, out of hearing of the jury, admonished the witness regarding the penalties should he perjure himself and told him that he was not required to testify. The witness then refused to testify and was excused by the trial judge. In finding denial of a fair trial, the Supreme Court stated:

"In the circumstances of this case, we conclude that the judge's threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment." 409 U.S. at 98

It is respectfully submitted that in the present case the limitations placed on the testimony of the defense witness Braff (discussed below), even considered apart from the other limits placed on the defense, "effectively drove that witness off the stand" and require reversal.

In Washington v. Texas, supra, the Supreme Court found a Texas statute prohibiting coparticipants in a crime from testifying on one another's behalf violative of an accused's Sixth Amendment right to have compulsory process for obtaining witnesses in his favor, stating:

"Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law." 388 U.S. at 19.

Similarly in Chambers v. Mississippi, supra, the Supreme Court held that the Mississippi hearsay rule could not constitutionally be applied to thwart the presentation of an effective defense:

"Few rights are more fundamental than that of an accused to present witnesses in his own defense. E.g., Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14, 19 (1967); In re Oliver, 333 U.S.257 (1948).... The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the

> basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." 410 U.S. at 302.

Against this background, we examine the specific limitations imposed on the defense.

A. Limitations on the Testimony of Lewis Braff

Lewis Braff, a certified public accountant had been Corr's accountant for over ten years (273a). Corr offered to prove through Braff that, during the period of the alleged conspiracy, he had sustained losses of more than $1,100,000 in connection with his purchases and sales of Judo stock and his investment in Judo franchises.* Such testimony was essential to the defense for the several reasons discussed below. Yet the trial judge placed the following arbitrary restrictions on Braff's testimony as to Corr's losses: (1) the testimony was limited to losses on purchases of Judo stock made before the end of June 1973 (270a); (2) evidence as to the defendant Corr's losses on Judo franchises was excluded (291a-292a); and (3) also excluded was evidence as to Corr's losses on purchases of Judo stock assumed when members of the "Ventura group" failed to repay to Corr loans for the purchase price of the stock in question (305a-309a). The net effect of these restrictions would have been to permit

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* Details of the contemplated Braff testimony are contained in defendant's exhibit EH (identification) (357a-362a). See also defense counsel's offer of proof (274a-275a, 282a-287a).

Corr to prove losses of only $144,000 instead of the more than $1,000,000 in losses he actually sustained.* Such restrictions undercut at least three crucial elements of Corr's defense:

First, the proffered evidence was offered to refute the contention of the government that Corr profited immensely from the alleged fraud at the expense of the investing public and members of his own family (332a-335a).

Thus the government elicited the following testimony from its witness Kern a principal of Morgan Kennedy:

"Q. Confining yourself to the swap Judo and Health Delivery, what was the total loss of the firm and to the customers as a result of your entering into this swap?

Mr. Lesch: I object to this, your Honor.

The Court: I will allow it.

A. Oh, very close to a million dollars.

Q. Combining customer's loss and the firm?

A. Yes, sir." (Tr. 2463 ll. 18 -25).

The government further attempted to establish that Corr had appropriated the proceeds of sales of Judo from accounts of his brother Raymond Corr (Tr. 1509-1510, 4983); his half brother Joseph Sonberg ("Sonberg") (Tr. 4987), and his former wife Kathleen Newberry** ("Newberry") (Tr. 1080-1087; 1096; 4990-4991). In addi-

* Upon imposition of the third limitation discussed above, the defense decided not to call Braff as a witness (309a).

** Kathleen Newberry's maiden name was "Keogh", and she was frequently referred to as "Keogh" by both counsel and witnesses.

tion, John Filmore ("Filmore") the representative of the SEC who prepared the government charts suggested in his testimony that Corr had earned profits of $200,000 to $300,000 from such sales in 1972 (227a) and obscured the fact that these amounts represented proceeds from sales, not profits (227a-228a).

The prosecutor in his summation exploited this testimony by obscuring, as had Filmore, the distinction between sale proceeds and realized profits in an attempt to picture the defendant as having appropriated enormous profits properly belonging to others:

> "Look at those charts. $69,375 paid out of accounts. What did Kathleen Keogh get out of that? $57,000, what did Kathleen Keogh get out of that? $27,000, what did Kathleen Keogh get out of that? $28,000, what did Kathleen Keogh get out of that? The total amount is in excess of $345,000. What did Kathleen Keogh get out of that? Where was it split up, when did it take place, what did she get? Mr. Corr says she divided it up in 1973. His explanation was in '73 he came to her, he said, want to divide it, she said, no. My new husband does not want any part of it. You just pay my taxes. Do you think for a moment that Kathleen Newberry, who is taking home $91 a week in 1972 would turn down any part of $345,000?" (332a)

* * *

> "The conversations in October, when they had those meetings, Buschbaum would remain high bit. Why? Mr. Buschbaum remains high bid so that Mr. Corr and his friends can sell out $600,000 worth of stock below the market, it could still be sold to the Morgan, Kennedy customers below the market, and Mr. Roger Drayer and Jenny Associates will maintain the price of the market by creating a lot of demand during that period of time." (335a)

In response to these suggestions of enormous profits, Braff's testimony would have shown that Corr had lost a total of

$1,105,027 on his investments in Judo stock and franchises a of June 30, 1973.

Second, the excluded Braff testimony insofar as it related to losses suffered by Corr was also relevant evidence to support Corr's contention that his allegedly fraudulent activities were undertaken in good faith. United States v. Meyer, 359 F.2d 837, 839-840 (7th Cir. 1966); United States v. Corlin, 44 F. Supp. 940, 949 (S.D. Cal. 1942). The trial judge ruled that evidence of loss could be offered in support of Corr's good faith defense (Compare 278a-280a with 289a-290a) but nevertheless excluded the proferred evidence.

Third, Braff's testimony would have established that Corr was a net buyer of Judo stock. The prosecution repeatedly elicited testimony from investors in Judo that they were unaware that Corr was selling Judo stock in 1972 (Tr. 352, 386, 912, 1025, 1149, 1164, 1374, 1699, 1718). While Corr acknowledged that he did sell at various times (Tr. 3648-3653), he contended that in 1972 he was a net purchaser. Braff's testimony would have established that Corr's net position at the end of 1972 was 256, 700 shares (359a), and thus would have corroborated Corr's contention that rather than reducing his own position while encouraging others to buy, he believed in the future of Judo as evidenced by the fact that he constantly increased his stock holdings throughout 1972 and 1973.

Considered as a whole the trial judge's three restrictions on the Braff testimony rendered it useless for any of the

purposes described above. The restriction limiting evidence of losses to losses resulting from stock purchased and losses sustained prior to the end of June 1973 (270a) excluded testimony regarding substantial losses in both stock and franchise investments. In contrast to the time limit placed on the defense, the government was allowed to present evidence of stock purchases by the defendant (indeed, of a stock other than Judo) beyond June 1973 (125[illegible]). Testimony regarding stock purchased after June 1973 would have been strong corroboration of Corr's good faith defense as by that time a number of adverse developments had made Judo an unlikely investment for all but "true believers" in the company's future (Ex. BC).

Despite the effect of the time limitation on the utility of the Braff testimony, the defense accepted it (274a) because of the substantial importance of the testimony to its case. Thus defendant's exhibit EH (identification) (357a-362a) contains no references to stock purchased or losses sustained after June 30, 1973.

The second restriction (excluding evidence regarding investment in franchises) even more severely limited the utility of Braff's testimony. Of the total losses reflected by Exhibit EH for identification, $209,467 were attributed to his interest in the Judo franchises (357a). One of Corr's principal duties as a Judo employee was to set up the company's franchise program (Tr. 72, 3451-3453), and after setting up the program, Corr himself invested heavily in Judo franchises (Tr. 3504-3507). The

Court's ruling prevented Corr from effectively arguing that he recommended Judo stock because he believed in the underlying merits of the company - its franchising business - not because he wished to fraudulently inflate the price of Judo stock. Yet the defendant was quite arbitrarily precluded from presenting this evidence to the jury.

The trial judge's third restriction, excluding of evidence of losses amounting to $700,000 on purchases assumed by Corr (361a-362a) appears to have been based principally on his view that such inclusion would have been "contrary to defendant's own testimony as well as that of other witnesses as to the nature of those transactions." (305a). The defendant, however, consistently maintained that he enlisted Ventura, Van Ess and Cohen in support of his effort to gain control of Judo. In support of this effort, he advanced funds to these individuals to purchase Judo stock. When these individuals failed to repay the loans, Corr assumed the purchases and suffered the resulting loss. (Tr. 3937-3948). He merely sought to argue to the jury that such a course of conduct was inconsistent with the fraudulent scheme alleged by the government. We respectfully fail to see where the inconsistency that troubled the trial judge arises. In any event, "counsel is free to take any tack, however inconsistent it may be with his other lines of defense, which he thinks may raise a reasonable doubt of the defendant's guilt." United States v. Keogh, 440 F.2d 737, 747 n. 12 (2nd Cir. 1971) cert. denied 404 U.S. 941 (1971).

The trial judge suggested that the Braff testimony was unnecessary because Corr himself testified as to his losses in his Judo investment (284a, 304a, 306a-307a). It is respectfully submitted that it cannot seriously be contended that testimony by the defendant as to his losses had the same influence on the jury as similar testimony by a certified public accountant. See United States v. Dellinger, 472 F.2d 340, 385 (7th Cir. 1972) ("Because the testimony of the expert witnesses .... could have negated a crucial element in the proof of the government ... we conclude that it was an abuse of discretion to foreclose that possibility"). In short, the arbitrary limits placed on the Braff testimony deprived the defendant of his right to present a full defense to the charges against him.

B. Exclusion of the SEC Release

The defendant Corr offered in evidence an SEC release dealing with the results of that agency's investigation into trading in Judo (356a). The trial judge sustained the government's objection to the release (254a).

The highly probative nature of the release, which announced the termination on August 27, 1973 of the suspension imposed on trading in Judo on May 10, 1973, is readily apparent. The government had elicited testimony regarding the suspension from its witnesses (145a, Tr. 1163). The jury was informed of the scope of the ensuing SEC investigation (221a-224a). Large portions of the testimony of Corr before the SEC were read to

the jury (Tr. 3079-3178). Under these circumstance, the defendant clearly was entitled to present the results of the SEC investigation to the jury.

In addition the SEC release supported Corr's contention that his shares of Judo were freely tradeable. Counts two through nine of indictment 75 Cr. 803 (EW) charged Corr with unregistered sales of securities in violation of 15 U.S.C. §77e and Count I charged Corr with conspiracy to violate 15 U.S.C. §77e in violation of 18 U.S.C. §371. It was the prosecution's theory that Corr was a "control person" of Judo and thus required to register his sales of Judo stock (Tr. 5342-5346); United States v. Wolfson, 405 F.2d 779, 782 (2nd Cir. 1968), cert. denied, 394 U.S. 946 (1969)). The SEC release showed that after its investigation that agency had found that Corr's shares were part of the "public float" (i.e. "shares available for public trading") in the stock:

> "It appears that the public float in the stock, the number of shares available for public trading, is approximately 250,000 shares of which approximately 150,000 shares or 60% of such float may be controlled directly or indirectly by one person. It is possible therefore that Mackey's stock may be subject to erratic price movements." (356a).

The person referred to in this quotation was indisputably Corr. Corr was clearly entitled to use this prior determination by the government that 150,000 of his shares were "available for public trading" and part of the "float"* as evidence against a

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* That the SEC did not include in the "public float" shares subject to a registration requirement is evident from the fact that Mackey's shares were not included in the SEC's public float calculation. Mackey was clearly a control person subject to a registration requirement and the approximately 600,000 shares he held (Ex. E, p. 4) are not reflected in the SEC's public float figures.

subsequent allegation that a registration statement covering Corr's shares had to be filed and effective before Corr could sell them.

Furthermore the SEC release falls squarely within the exception to the hearsay rule provided by Federal Rules of Evidence, Rule 803(8)(C) which permits the admission

> "against the Government in criminal cases [of] factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness."

Findings by the SEC were held to fall within Rule 803(8)(C) in SEC v. General Refractories Co., 400 F. Supp. 1248, 1255-1256 (D.C. 1975); see also United States v. Smith, 521 F.2d 957, 968 n.24 (D.C. Cir. 1975); Advisory Committee Note to Rule 803 (8)(C); 4 J.Weinstein, Evidence, ¶ 803(8)[03] p. 803-185 (1975).

C. Exclusion of Evidence Relating to Mackey's Pending Sentence for Mail Fraud

H. Jerome Mackey was the founder of Judo (Tr. 68), its president and chairman of the board (Tr. 69) and a principal witness for the government (Tr. 66-156). It was the contention of the defense that there existed numerous reasons to expect Mackey to testify falsely regarding his dealings with Corr. Perhaps the most important of these reasons was Mackey's impending sentence in the Eastern District of New York for the crime of mail fraud. (94a-107a). Defendant's exhibit A (identification) (348a) was a letter from the United States Attorney for the Eastern District to the Honorable Jack B. Weinstein, the sentencing judge in the Eastern District, regarding the seriousness

with which the United States Attorney for the Eastern District viewed Mackey's offense. The letter in describing Mackey's crime stated:

> "The instant case is in our view a major fraud case....The defendants defrauded a large number of their distributors out of thousands of dollars....There was ample evidence at the trial by victims of the fraudulent scheme as to their considerable financial loss, and the frustration and sorrow that they experienced. Furthermore, after the scheme to obtain the monies by fraudulent pretenses had terminated, the defendants attempted to conceal the fraudulent scheme by making false statements to victimized distributors as well as to the Nassau District Attorney.
>
> "Accordingly, for the above-stated reasons, we respectfully recommend that the defendants Jerome Mackey and William Nelson be sentenced to a term of imprisonment and incarcerated for an appropriate period of time." (349a).

The letter was excluded upon objection by the government (101a). Subsequent questioning possibly relating to the contents of the letter was likewise not permitted (102a-103a).

Despite the concern with which Mackey's crime was viewed in the Eastern District, upon intervention by the United States Attorney for the Southern District, Mackey's sentencing was postponed until after trial in the present proceeding (Ex. B, 350a-351a). Exhibit A thus supported the defendant's contention that Mackey was under powerful pressures to provide testimony helpful to the government in the instant case, and it is submitted that in these circumstances it was error to exclude Exhibit A. As this Court stated in United States v. Masino, 275 F.2d 129, 132 (1960):

> "When a witness in a criminal case is being questioned as to his possible motives for testifying falsely wide latitude should be allowed in cross-examination . . . It was highly relevant and material to bring out that the state court charge for possessing . . . instruments for the administering of narcotics had been quashed upon the intercession of the Assistant United States Attorney as was claimed by the defense and not denied by the government. This is the kind of situation where the widest possible cross-examination should be permitted. The appellant was entitled to have the jury know what had happened with respect to the charge, including any part which representatives of the government had played, so that the jury could draw its own conclusions with respect to possible motives for Brown's testimony. It was substantial error for the trial judge to restrict this line of cross-examination."

Accord: United States v. Leonard, 494 F.2d 955, 962-963 (2d Cir. 1974).

D. Exclusion of Testimony Regarding the Relationship of Leroy and Jean Goldfarb to the Underwriters Bank & Trust Co.

Count thirty-four of indictment 75 Cr. 803 (EW) charged Corr with violating 18 U.S.C. §1014 in making false statements to the Underwriters Bank & Trust Co. ("Underwriters Bank") for the purpose of influencing the bank to extend a $20,000 loan. In connection with this count, the government introduced three loan documents (Ex. 40, 44 and 66) allegedly signed by Kathleen Keogh. The government witness Jean Goldfarb testified that she had signed Keogh's name on these forms at Corr's request (208a-214a). Corr testified that while the Underwriters Bank had made a loan to Keogh at his request, he had made no false statements to the bank, had not asked Jean Goldfarb

to sign government exhibits 40, 44 and 66 and had in fact never seen these documents until the initiation of the present proceeding (Tr. 3795-3820).

The sharp conflict between the testimony of Jean Goldfarb and Corr had an importance beyond count thirty-four and was a crucial test of Corr's credibility. Yet the trial judge limited attempts by the defense to provide evidence of motivation for Jean Goldfarb to forge Keogh's name to government exhibits 40, 44 and 66 and then to falsely accuse Corr of inducing her to do so.

The defendant offered evidence tending to show that Jean Goldfarb had forged Keogh's name as an accomodation, not to Corr, but to Coyne, the administrative vice president of Underwriters Bank. The following circumstances supported this contention:

1. There was no motivation for Corr to forge Keogh's name. He gained nothing from it. The sole reason why the loan was to be extended to Keogh, rather than Corr directly, was that the Bank President had suggested that, because Corr already had borrowed close to $100,000 - the limit of the Bank President's authority to lend without Loan Committee approval - the loan should be made to a relative (Tr. 3477-3478). There was ample evidence that Corr's half brother would have signed such a note.

2. The Underwriters Bank was being examined by New York and federal bank examiners at the time of the Keogh loan (Tr. 3480).

3. The former president of the Underwriters Bank testified that at the time of the Keogh loan and the examination of the bank certain loan documents were missing (Tr. 3481).

4. The administrative vice president of the bank, Coyne, testified that he had pleaded guilty to the crime of embezzlement by making false entries in the books of another bank (183a).

5. Jean Goldfarb and her husband, Leroy were heavily in debt to Underwriter's Bank, a fact providing motivation to "help out" the bank official who supervised their loans. Thus there was evidence of heavy borrowings by Jean and Leroy Goldfarb at the bank (Ex. EK - EN), that as of June 1, 1972 the bank had an outstanding demand loan to Jean Goldfarb of $50,100 (Ex. EK), that Jean Goldfarb on at least one occasion signed a blank document for the bank (Ex. EP), that Jean Goldfarb did not carefully read documents she signed for the bank (Ex. EO), and that the loans by the bank to the Goldfarbs were on occasion under-collateralized (Ex. EQ).

However the defense was precluded from inquiring of Coyne, the administrative vice president of the bank, as to the extent of the Goldfarb's indebtedness to the bank (200a-203a), and the manner in which he had previously forged documents (195a-197a). Also defendant Corr was prevented from testifying that Leroy Goldfarb had told him that he was heavily in debt to the bank and that he was in danger of losing his residence as a result of this indebtedness (246a-252a).

The trial judge appears to have limited the evidence

regarding the Goldfarbs' relationship to the Underwriters Bank because he regarded the defense contentions in this matter as implausible (202a, 252a). But as the trial judge stated in admitting defendant's exhibits EK through ER the alleged implausibility of the defense contentions could properly be argued to the jury (Tr. 4423-4424). The barring of defendant's evidence relating to Jean Goldfarb, it is submitted, were additional instances of arbitrary restrictions on the defendant's right to fully answer the charges against him.

E. Exclusion of Testimony by Richard Sobel

Richard Sobel was a former registered representative who was indicted as a member of the conspiracy and ultimately entered into an agreement with the government (Ex. 37) and pleaded guilty to one count of securities fraud (162a-163a). Sobel's partner in the brokerage business was Daniel Salant (138a, 164a) who was also a government witness but who had not been indicted, having been named only as an unindicted co-conspirator. Salant and Sobel's brokerage business was quite small (160a) and even under the government's view of the case they were rather peripheral members of the conspiracy. However the testimony of these two individuals was important to the government as the sole evidence that Corr had offered anyone a "payoff" in furtherance of the alleged conspiracy.

Salant testified that Corr had offered Sobel and himself an option to each purchase 500 shares of Judo at

$5 a share if they sold 10,000 shares to their customers (143a). Sobel testifying to the same conversation testified that the amount required to be sold was 5000 shares (167a). This testimony provided the government with a partial answer to the rather perplexing question of the motivation of the members of the alleged conspiracy other than Corr, since the government conceded that these individuals had a quite small financial stake in the conspiracy.

Sobel and Salant testified that their participation in the conspiracy was precisely the same (157a, 177a). They were both present at all meetings with Corr in furtherance of the conspiracy (157a-158a, 177a-178a). Yet Salant was not indicted while Sobel was. Salant however had prior to the time of the indictment of the defendants informed the government of the alleged payoff (152a-156a). Sobel while he had been questioned by the SEC had said nothing about the payoff (175a-176a). After being indicted, Sobel of course also testified to the payoff offer.

The defense contended that the situation of Sobel and Salant provided as no other evidence in the case an illustration of the pressures on witnesses to provide testimony favorable to the government. Without the opportunity to demonstrate such pressures, the defense could not hope to prevail in a case such as this where the government's major witnesses were almost without exception unindicted co-conspirators or facing sentencing. Mackey had been convicted of mail fraud in the Eastern District of New

York and was facing sentencing (91a-92a). Buschbaum (Tr. 393-395), Chajet (Tr. 1171-1172), Kern (Tr. 2231-2232), Sobel, and Murphy (Tr. 1821-1822) had pleaded guilty to counts in the indictment in this case, had entered into agreements with the government and were awaiting sentencing. Raymond Corr, Daniel Salant, and Jean Goldfarb's husband Leroy were unindicted co-conspirators.

The defense was however precluded from eliciting from Sobel testimony regarding the pressures on such individuals and himself in particular to provide testimony favorable to the government. Cross-examination regarding such pressures is entirely proper. Davis v. Alaska, 415 U.S. 308 (1974). Gordon v. United States, 344 U.S. 414, 422 (1953). Alford v. United States, 282 U.S. 687, 693(1931). Denial of the right to effective cross examination is "constitutional error of the first magnitude" which "no amount of showing of want of prejudice" can cure. Davis v. Alaska, supra, at 318 quoting Smith v. Illinois, 390 U.S. 129, 131 (1968) and Brookhart v.Janis, 384 U.S. 1, 3 (1965). Yet in the case of Sobel such cross examination was abruptly terminated by the trial judge, who sustained objections to four questions seeking to elicit Sobel's understanding as to why he had been indicted and Salant had not been indicted (178a-181a) and then stated:

> "THE COURT: I hold this witness' understanding as to why he is a defendant in this case is not a proper question and please refrain from this area of inquiry. The grand jury makes the determination as to whom to indict and whom not to indict. This witness' understanding has nothing

to do with it. I foreclose any inquiry into it. Please proceed to another subject. Your exception is noted." (181a).

Again it is submitted that considered both by itself and in combination with the other actions herein discussed, this ruling by the trial judge seriously impaired Corr's ability to present an effective defense.

F. Exclusion of Testimony by Chajet

The cross-examination of Chajet was similarly unduly restricted. Chajet was an employee of Morgan Kennedy, a market maker in Judo stock (Tr. 1173), and a principal witness for the government. Defense counsel was not permitted to ask Chajet if he had been investigated by the SEC in connection with a stock other than Judo (125a-126a).

While the result of an SEC investigation cannot be used for impeachment purposes (Federal Rules of Evidence, Rule 609(a)), questions regarding such investigations on cross-examination are proper in certain circumstances. United States v. Benson, 487 F.2d 978 (3d Cir. 1973). In the Benson case, inquiry regarding SEC investigations was held to be proper if "it [is] addressed to matters developed by [the witness] on direct." 487 F.2d at 983. In the case of Chajet, inquiry into the SEC investigation was necessary to determine the scope of his agreement with the government introduced on direct examination (Ex. 74, 342a; 124a) in which he agreed to "disclose all information with respect to the activities

of himself and others in all matters which the Government is investigating" and which provided that in the event of violation Chajet could be prosecuted "with regard to any and all violations of law of which [the government] has evidence." Clearly once the government entered into this agreement with Chajet all current SEC investigations of his activities became proper cross-examination material. Any other result would render nugatory the defendant's right to cross-examine Chajet with respect to the agreement and determine his motivation for providing the government with favorable testimony. See Davis v. Alaska, 415 U.S. 308 (1974); Alford v. United States, 282 U.S. 687, 693 (1931).

G. Failure to Require the Government to Make Available Material Relating to Coyne

As discussed above, the government witness Coyne, formerly administrative vice president of Underwriters Bank, testified regarding the allegedly false loan application filed by Corr at the bank. Coyne testified that the purpose of the loan in question was to purchase Judo stock (186a) and that Corr gave Coyne the loan documents allegedly signed by Keogh but which Jean Goldfarb testified that she had signed at Corr's request (government exhibits 40, 44 and 66; 188a, 192a). In these respects his testimony was directly contrary to that of Corr (Tr. 3796, 3817-3819) and corroborated the testimony of Jean Goldfarb (208a-214a).

Impeachment of Coyne was thus essential to the defense. Coyne had pleaded guilty to the crime of embezzlement

(183a). In connection with his guilty plea, he entered into an agreement with the government (government exhibit 122 (345a)). The embezzlement conviction arose out of falsification of expense records by Coyne at the Franklin National Bank (194a-195a), and was proper impeachment material (Federal Rules of Evidence, Rule 609 (a)(2)). In addition, full explanation of the embezzlement conviction was highly relevant to the defense contention that Coyne in conjunction with Jean Goldfarb may have been responsible for the falsification of Keogh's signature on government exhibits 40, 44 and 66.

The trial judge granted the government's motion to withhold certain material in its possession relating to Coyne (Tr. 2825-2826). Defense counsel have no knowledge of the contents of this material which has been transmitted under seal to this court (designated as Ex. 288). However one may conjecture that the material relates to Coyne's embezzlement conviction. If so, for the reasons outlined above, we urge it should have been made available to the defense under either 18 U.S.C. §3500 or Brady v. Maryland, 373 U.S. 83 (1963).

In summary, the actions of trial judge discussed above prevented the defendant Corr from presenting an effective defense to the charges against him.

POINT II

COUNTS TWO THROUGH NINE OF INDICTMENT 75 CR. 803 (EW) SHOULD HAVE BEEN DISMISSED FOR INSUFFICIENT EVIDENCE

Counts two through nine of indictment 75 Cr. 803 (EW) charged Corr with unregistered sales of Judo securities in violation of 15 U.S.C. §77e. The trial judge correctly charged that the government was required to prove that Corr was a "control person" of Judo in order to establish a violation of 15 U.S.C. §77e (Tr. 5342-5346; United States v. Wolfson, 405 F.2d 779 (2nd Cir. 1968), cert. denied, 394 U.S. 946 (1969)). As to the meaning of "control", see Rule 405 promulgated by the SEC under the Securities Act of 1933; 17 CFR § 230, 405 (reproduced in the addendum, infra). However, it is submitted that the evidence on this issue unequivocally established that Corr was not a control person and that it was error to submit these counts to the jury.

The evidence was overwhelming and uncontradicted that Corr possessed no direct or indirect "power to direct or cause the direction of the management and policies" of Judo (See SEC Rule 405) and that such power resided solely in Mackey, Judo's founder. Thus, on cross-examination Mackey testified, that he was the Chief Executive Officer of Jerome Mackey's Judo, made all decisions with respect to location of franchises, compensation of all important employees of the Company, and whether advertising contracts would be entered into (108a-109a).

He further testified:

Q. Indeed at all times relevant to this case, I believe, '71, '72, and '73, you owned more than 50 percent of the outstanding common stock of Jerome Macke Judo, didn't you?

A. Yes, sir."

* * *

"Q. So, Mr. Mackey, it is correct, its it not, that throughout 1971, 1972 and 1973 and indeed after that time, you and you alone had the power to elect the entire Board of Directors of Jerome Mackey's Judo, Inc.?

A. That's my understanding, yes." (110a, 113a).

A form 8-A filed with the SEC on October 20, 1972 (Ex. BB; 353a) confirmed Mackey's testimony regarding his power to unilaterally elect the board of directors (355a). Mackey further testified that Corr was never an officer or director of Judo and never possessed a company credit card or company car (115a).

In sum, Mackey testified that he was the sole person in charge of the management and policies of Judo. (116a-117a).

Other evidence in the case provided further confirmation that Mackey and Mackey alone made all management decisions. Raymond Corr who was employed by Judo for a time testified that although his brother initially approached him in regard to joining the company, his hiring was subject to approval by Mackey (136a). Steven Greenberg, a government witness who had been a financial public relations consultant to Judo testified similarly regarding his retention by the firm (219a). A letter of intent for Judo to acquire the capital stock of another corporation was signed by Mackey not Corr (Ex. R, 351a-352a).

Thus at the conclusion of the government's case the only evidence directed to the issue had demonstrated that the sole control person of Judo was Mackey. In denying Corr's motion to dismiss counts two through nine at that time, the only evidence to the contrary that the trial judge pointed to was apparently the testimony of the government witness Martin Leshman (232a). Leshman, an investor living in Michigan testified as follows:

"Q. Did there come a time when Mr. Corr, Mr. James Corr told you what his duties and what his position was with Jerome Mackey Judo?

A. Not a specific time that I can recall, just in conversation of the fact that he and I guess Jerome Mackey with the controlling interest in this company and that they were -- they had developed this concept of self-defense, they were advertising it heavily, they were promoting it heavily. There would be resulting earnings in it. There was a possible chance of them arranging some type of merger with some type of telephone communications company at the time. I can't recall specific conversations pertaining to this. I think it's a matter of general impressions." (120a-121a)

Initially, it is unclear whether the phrase "with the controlling interest" modifies only "Jerome Mackey" or "he and ... Jerome Mackey." Even assuming that the phrase could be said to refer to Corr and Mackey jointly, it is submitted that if the prosecution's sole evidence of control was the "general impressions" of an individual investor in Michigan, otherwise unconnected with Judo, counts two through nine should not have been submitted to the jury.

Corr corroborated Mackey's testimony that Mackey had total control of the company (242a-245a). Corr also provided uncontradicted testimony regarding his abrupt dismissal as an

employee of Judo when he was subpoenaed to appear before a grand jury in November 1972 (241a). His dismissal from Judo's employ is totally inconsistent with the notion that he was in control of the management and policies of Judo.

Raymond Gould ("Gould") was general manager of Judo during the period when Corr was alleged to be a control person of the company (310a). Gould testified that the decisions regarding judo instruction, advertising contracts, equipment purchases and leases were made solely by Mackey (312a-313a) and that "I have never known anyone in that company to make a decision other than Jerome Mackey" (313a).

Despite overwhelming evidence, the jury by its verdict on counts two through nine necessarily found that Corr was a control person of Judo. Review of the record indicates that this verdict could have been reached only by (improper) consideration of the rebuttal testimony of the government witnesses Howard Bergtraum ("Bergtraum") and Peter Davis ("Davis"). Bergtraum, an associate of the law firm that had represented Judo (319a-320a) and formerly employed by the SEC (320a) testified over objection that he had told Corr that Corr was a control person (321a-322a). It was stipulated that Davis, a partner of the same firm, would testify similarly to Bergtraum (Tr. 4919 ll. 4-8).

While the Bergtraum testimony was not admitted to show that Corr was a control person but was only offered to rebut Corr's testimony (Tr. 3718-3721) that both Bergtraum and Davis were aware that he was selling stock but that neither advised him that he was

a control person and as such could not sell (317a), from the jury's point of view Bergtraum's testimony obviously represented an expert opinion that Corr was a control person. As such, it was an abuse of discretion to admit the testimony. See Advisory Committee Note to Federal Rules of Evidence, Rule 704; 3, J. Weinstein & M. Berger, Evidence, ¶704 [01] pp. 704-8-704-9.

In any event, even assuming that the admission of Bergtraum's and Davis' testimony was proper as limited, there was not a scintilla of evidence to support the conclusion that Corr was a control person of Judo.

The denial of Corr's motion to dismiss counts two through nine at the close of the prosecution's case and the submission of those counts to the jury was manifestly erroneous.

POINT III

COUNTS FOUR, SIX, SEVEN, AND TEN OF INDICTMENT 75 CR. 1059 (EW) SHOULD HAVE BEEN DISMISSED

Counts four, six, seven, and ten of indictment 75 Cr. 1059 (EW) charged Corr with violations of 18 U.S.C. §1001 in making allegedly false statements in testifying before the SEC during its investigation into trading in Judo stock.

Count four should have been dismissed because the allegedly false statements are unresponsive. The question immediately preceeding the answer which is the subject of this count does not appear in the original version of indictment 75 Cr. 1059

(73a-74a). However, the relevant question did appear in the version of the indictment given to the jury. (Tr. 5403). The complete question and answer which is the subject of this count (with the prosecution's ultimate allegations of falsehood underlined) (Tr. 5403-5404) is as follows:

"Q. You made no other sales for Mr. Bradley of the stock?

A. No. This is like a week or 10 days before the suspension.

I have an interest with a South American group of very substantial and wealthy people, the Venturo [sic] family. They are clients of Barry Drayer and originally from Chile.

They wanted very much to participate in getting control of the corporation. They had a sizeable position, and prior to the suspension I met with Mr. Kramer and I explained to him the situation. And we did want to in effect buy control, and we were in the process of buying stock on the open market.

With the stock on the open market and my 205,000 [sic should read 250,000] shares, we would control about 47 percent of the company.

And other insiders expressed an interest, and we have been basically going to make Mr. Mackey an offer, and we are in negotiation to make an offer, and he gave a price of what he wanted to sole [sic, sell] control and we were in the process of making that decision.

So I exercised a lot of control over the Venturos [sic]. I don't exercise control over the majority of their brokerage accounts. They have them all over the country and world and they do most of it through Bank America. I have no control over that.

Probably most control again would be through Barry Drayer, power of attorney which they gave him. And when we were acquiring stock, in fact, we were giving dollar figures as to what we could acquire, how many shares and how many dollars involved.

So you might say complete control as to dollar amount and specifically to buy Mackey stock.

That family includes Rafael Venturo [sic] his company doctor, Isaac Cohen, and Heime Venturo [sic]. That would-be almost complete control of one set of circumstances, not the entire brokerage business.

As pointed out by the court in United States v. Cobert, 277 F.Supp. 915 (S.D. Cal. 1964), the definition of perjury necessarily precludes indictment for that crime on the basis of an unresponsive answer:

> "As is indicated above, in order to show perjury the minds of the questioner and the defendant must meet. If the defendant does not understand the question and gives a non responsive answer, that answer cannot be perjurious. He cannot have wilfully stated a falsehood when he did not even understand the question. Thus, where it is clear from the face of the indictment that the defendant has not answered the question asked, he can hardly be held to have answered it falsely, and no assignment of perjury can be sustained.
>
> "Applying this principle to the case at hand, it is clear that the defendant's answer to the question concerning lay-offs will not sustain an indictment for perjury. He was asked if he had 'discussed' lay-offs with Hy Kamin, and he said: 'No. We don't lay-off. We cut the bet down at the source. That's why I told you I'd rather take you at 10 percent and not him. His I'd sooner turn down.' This whole rambling answer has little or nothing to do with the question. It is true that defendant said 'No', but the rest of his answer explains that statement. Plainly, you cannot tear one word out of context and predicate a perjury charge upon it. Defendant was asked if he discussed lay-offs, and answered that he does not, in fact, lay-off. That is nonresponsive at worst, and in no way shows that he committed perjury." 227 F.Supp. at 919.

In the present case, Corr's initial response of "No" to the question "You made no other sales for Mr. Bradley of the stock?" was completely responsive (and, as the government concedes, correct). (Bradley was a former business associate of Corr

who was president of a company that was involved in unconsumated merger discussions with Judo (Tr. 1950, 1960-1961).) His subsequent rambling discussion of totally unrelated matters cannot be the basis of a §1001 indictment.

Counts Six, Seven, and Ten share a common defect which required their dismissal. It is submitted that the alleged false answers in these counts are either entirely consistent with the government's contentions of fact or that their alleged falsity derives solely from the government's rather tortured construction of the questions. Perjury counts so based cannot be maintained under the rule of Bronston v. United States, 409 U.S. 352 (1973).

The perjury prosecution in the Bronston case (under 18 U.S.C. §1621) was based on the following series of answers given by the sole owner of a corporate petitioner under Chapter XI of the Bankruptcy Act to questions posed by a creditor's lawyer at a hearing before a referee in bankruptcy (409 U.S. at 354):

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

A. No sir.

Q. Have you ever?

A. The company had an account there for about six months, in Zurich.

Q. Have you any nominees who have bank accounts in Swiss banks?

A. No, sir.

Q. Have you ever?

A. No, sir."

It was undisputed that while the answers to the questions were literally true, the defendant had had a personal account in a Swiss bank until shortly before the bankruptcy hearing. A jury verdict finding the defendant guilty of perjury was upheld by the Court of Appeals. The Supreme Court reversed.

The Supreme Court rejected the notion that a perjury conviction could be based on the implication in the answer to the second question above that no personal Swiss bank account had ever existed, despite the fact that "in casual conversation this interpretation might be reasonably be drawn" (409 U.S. at 357). The Court stated:

> "It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular, is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination." 409 U.S. at 358-359.

The Court went on to reject the notion that the conviction could be upheld on a basis of the jury's finding that the defendant intended to mislead his examiner, holding (at 409 U.S. 359-360) that to allow a jury to convict on this basis would deter potential witnesses from testifying and that in the Anglo-American legal system the primary safeguard against errant testimony is not the perjury statutes but the adversary process itself: "The burden is on the questioner to pin the witness down to the specific object of the questioner's inquiry [citing cases]" (409 U.S. at 360-361). Finally, the Court rejected the

government's theory that the unresponsiveness of defendant's answer and the affirmative cast of that answer somehow provided the basis for a perjury conviction. Again the Court stated that the remedy for such answers lies in more acute questioning not in resort to the perjury statute: "Precise questioning is imperative as a predicate for the offense of perjury" (409 U.S. at 362). See also, United States v. Lattimore, 215 F.2d 847, 849-850 (D.C. Cir. 1954).

It can be seen that the allegedly false answers in Counts Six, Seven, and Ten are precisely of the type that the Bronston case held fall without the perjury statute. Initially we note that the Bronston literal truth requirement has been held applicable to prosecutions under 18 U.S.C. §1001; United States v. Ehrlichman, 379 F. Supp. 291 (D.D.C. 1974). The testimony in Count Six is as follows, with the ultimate allegations of falsehood (Tr. 5404-5405) underlined:

"Q. Have you ever heard of Joseph Sonberg?

A. He is my half-brother.

Q. Do you know where he has maintained brokerage accounts in the last 18 months?

A. Yes.

Q. Where?

A. [1]Morgan Kennedy, Sterling Grace & Company, and Raymond James & Company.

Q. To your knowledge, do you know if Mr. Sonberg purchased Mackey stock?

A. Yes.

Q. Do you know how Mr. Sonberg came to purchase Mackey stock?

A. You mean--

Q. Did Mr. Sonberg go out and call up a broker and place an order, to your knowledge, or did you?

A. It really depends. I have full discretion on his account.

Q. I am interested in the situation where Mr. Sonberg purchased Mackey stock.

A. Well, there has been so many times. I am not being evasive but you are dealing with the last 18 months, now. [2] He purchased stock in Mackey a month ago or two months ago. [3] He purchased stock 18 months ago. If you give me a specific time I can tell you whether he called or I called or --

Q. Do you have any financial interest in that account, sir?

A. [4] Again, only towards accumulation. There has never been a disbursement of one dollar. Everything has been accumulation. Mr. Sonberg owns a lot of Mackey stock. Any dollars that have ever been put into the account have been toward the accumulation.

Q. Who put the dollars into the account?

A. Originally he did with money that he was owed by the company and by me for services. My brothers have always worked for me. I have owed them money for their services and I have paid them what I have owed them.

Q. Well then, is it your testimony that the money used to purchase the Mackey stock in any of the Joseph Sonberg accounts were moneys that belonged to Joseph Sonberg. Is that correct?

A. [5] Money that he had coming to him.

For example, the corporation owed him money which they paid him.

* * *

Q. On the sell orders for Mr. Sonberg, to your knowledge, do you know if Mr. Sonberg had received proceeds from the sale of his Mackey stock?

A. [6] As I previously stated, there has never been dollar disbursement. Always accumulation of other stock. And whatever stock is in the account, that belongs to Mr. Sonberg.

Q. Sir, when he sold his stock in Mackey during any point in time do you know to your knowledge whether checks were issued by the brokerage houses to Mr. Sonberg?

A. [7] If they were, they were for small debit balances because they were immediate repurchases made in the account.

I don't think there was a time where anybody sold and took a check. I think almost every time there was a sale, there was a counteract of a repurchase of securities."

The alleged falsity in answer [1] lies in the government's theory that while accounts may have been established in Sonberg's name, he lacked any beneficial interest in such accounts (Tr. 5347). It is submitted that rather than encumbering the case with semantic arguments regarding what constitutes "maintenance" of a brokerage account (Tr. 3377-3378, 3383), the government was required under Bronston to pose a more precise question such as "Did Sonberg have any beneficial interest in the accounts established in his name?"

Corr's assertion that Sonberg "maintained" accounts at various brokerage firms cannot under Bronston serve as the basis for a violation of 18 U.S.C. §1001 when (as the government did not dispute) accounts in Sonberg's name existed at the firms in question. As defense counsel pointed out (Tr. 3377-3378), had Corr given the opposite response and stated that Sonberg "maintained" no brokerage accounts, the SEC could

well have claimed that his answer was misleading and still indicted him under 18 U.S.C. §1001. It is to avoid placing witnesses in this type of situation where any answer they give can be claimed to be false that the government must be held strictly to the precise questioning requirement of Bronston.

Similarly answers [2] and [3] are false only upon the government's theory that though Judo stock was purchased for accounts established in Sonberg's name, Sonberg could not "purchase" stock when he lacked a beneficial interest in the account (Tr. 5347). Again, we submit that Bronston requires a more precise question such as "Did Sonberg have any beneficial interest in the stock purchased?" Again one may conjecture that had Corr given the opposite answers and testified that Sonberg had purchased no Judo shares, he still would have been indicted for making false statements before the SEC.

Allegedly false answer [4] is completely unresponsive. The question is "Do you have any financial interest in that account, sir?" Corr's answer deals with accumulation in the account and the fact that Sonberg owned a lot of Judo stock, but nowhere does he state that he does or does not have a financial interest in the account. As discussed above, an unresponsive answer cannot serve as the basis for a false statement count.

The alleged falsity of answer [5] lies in Corr's statement that the money used to purchase Judo stock for the

Sonberg accounts was "Money that [Sonberg] had coming to him." Again it is submitted that the alleged falsehood at base amounts to a semantic debate between the prosecution and the defendant Corr that could have been avoided by more precise questioning. Corr testified that regardless of who physically disbursed the funds used to purchase Sonberg's stock this investment in Judo represented money that he owed Sonberg (Tr. 3837-3838). The government did not dispute the fact that Corr owed Sonberg money. Rather it based its allegation of falsehood on its evidence that the checks used to purchase the stock were issued by Corr (Tr. 4990).

The final two allegedly false answers in this count must be read in conjunction. Corr's answer [6] that there was no disbursement is qualified by his statements in the answer [7] that "If they were [checks issued to Sonberg], they were for small debit balances...I don't think there was a time when anybody sold and took a check. I think <u>almost</u> every time there was a sale, there was a counteract of a repurchase of securities." (emphasis added). The government contended these answers were false because there were disbursments from the accounts (Tr. 4988-4989).

The net effect of the answers [6] and [7] is ambiguous. Such ambiguity is not sufficient to support a perjury count under <u>Bronston</u>. In order to support such a count the government should have obtained a precise statement from Corr that there were no disbusements whatsoever.

It is submitted that despite some differences in the individual questions, the falsehoods alleged in Count Six at base rest on the government's theory that Sonberg could not "maintain" an account where the account was in his name but beneficial ownership of the account was held by Corr. For the reasons discussed above, such a theory cannot under Bronston serve as the basis for a perjury count. While the defense contends that Bronston requires dismissal of Count Six in its entirety, should this Court find any of the individually alleged falsehoods deficient, a retrial of Count Six would be required since the jury could have convicted on the basis of any one of them.

Count Seven deals with the following testimony with allegedly false answers (Tr. 5406-5407) underlined:

"Q. Kathleen Keogh?

A. She is my ex-wife.

Q. During the last 18 months where has she maintained accounts?

A. [1] Sterling Grace, Raymond James, Fingerhut & Company, Cowen & Company, Hartzmark and Company.

Q. Did you have control over these accounts?

A. I had full control over the purchases and sales.

Q. Do you still maintain control over these accounts.

A. No.

Q. Do you know whether those accounts still own any Mackey stock?

A. She owns no Mackey stock whatsoever.

Q. Did you have financial interest in those accounts when you maintained control?

A. [2] Only to the extent of money that we owned from joint property. We were divorced and we had substantial interests in property any disbursement from the property and once we had money in the stock market, and to the extent that we traded out of our joint account was my financial interest. Just this year it has been divided up and whatever money was hers has been paid to her.

I would say there was probably a 50/50 splitup based on the equity maintained in the accounts."

* * *

"Q. So in 1972 did she know you were purchasing Mackey stock for her?

A. Yes.

Q. How do you know that she knew?

A. [3] As I previously stated, there was joint moneys involved. There was community property, joint property there were stocks we owned together, and she received a copy of every trade slip, and I would talk to her three or four times a week and tell her what we were doing.

Q. Sir, to your knowledge, do you know if any checks from brokerage houses were issued to Kathleen Keogh?

A. [4] Again, they would be like debit balances. I hardly ever sold where we didn't make a substitution. If checks were issued, they would be for debit balances, and I don't believe they would be substantial because almost in every case we made substitutions."

The allegations are virtually identical with those of Count Six and suffer from similar defects. The question regarding "maintenance" of accounts is simply too vague to support a perjury count where the government conceded that accounts in Kathleen Keogh's name actually existed.

Most of the falsehoods alleged in answer [2] are unresponsive. The falsehoods alleged in answers [2] and [3] regarding the "joint" nature of the accounts rest on the governmer s allegations regarding individual disbursements from the accounts (Tr. 4993-4994). In contrast, Corr testified that he understood the accounts to be "joint" property because of his obligation to ultimately pay Keogh half of their value regardless of the source of the funds used to establish the accounts or the mechanics of individual transactions in securities held in the accounts (Tr. 3772-3775). Likewise, we are unable to see how Corr's statement in answer [4] that if checks were issued, they were for debit balances (or any other testimony in this count) conflicts in any way with the government's contention that some disbursements from these accounts ultimately were deposited in bank accounts in Corr's name.

The allegedly false statement in Count Ten (Tr. 5411) is underlined in the following quotation:

"Q. Did you ever make any price projections to Mr. Buschbaum or anyone else, concerning the Jerome Mackey?

A. I don't believe so. I specifically always told people that the company was extremely well, that historically any company that I have been associated with that did well, and could double their sales in earnings it was a situation. We made earnings projections."

Again we submit that under Bronston Corr's statement that he didn't believe he made price projections cannot serve as the basis for a perjury conviction when the examining at-

torney could, by posing one additional question, have required Corr to make his ambiguous answer more precise. Furthermore, in the answer quoted above Corr acknowledged that he made earnings projections. An earnings projection coupled with a knowledge of the appropriate multiplier to apply to such earnings would result in a price projection. Multipliers for Judo earnings were freely available in published literature (Ex. W, p. A-991). Indictment of Corr for his statement that he "didn't believe" that he made price projections where there was no followup question to his statement that he made earnings projections is clearly the kind of abuse of the false statement statute that cannot be permitted under Bronston.

POINT IV

ERRORS IN THE TRIAL JUDGE'S CHARGE TO THE JURY REQUIRE A NEW TRIAL

A. The Pinkerton charge

The trial judge gave the jury a variation of the charge approved by the Supreme Court in Pinkerton v. United States, 328 U.S. 640, 645 n. 6 (1946):

> "Under this partnership or agency concept, if you find beyond a reasonable doubt that a defendant on trial was a member of the conspiracy before or at the time of the alleged substantive crimes, as charged in counts 12 through 33, to which I shall refer, and if you further find beyond a reasonable doubt that one of the other co-conspirators committed the substantive crimes charged

> in those counts, during and in furtherance of the conspiracy, then you may find the defendant on trial, whose case you are considering, guilty of the substantive offense, even though he may not have been directly involved in its commission." (Tr. 5302-5303)

It is submitted that the giving of the Pinkerton charge in this case was error in view of recent decisions of this Court discussing the charge. United States v. Bermudez, 526 F.2d 89, 98-99 (2d Cir. 1975), United States v. Miley, 513 F.2d 1191, 1208-1209 (2d Cir. 1975), cert. denied --U.S.--(1976). United States v. Sperling, 506 F.2d 1323, 1341-1342 (2d Cir. 1974), cert. denied 420 U.S. 962 (1975).

In Sperling, this Court cautioned that the Pinkerton charge should not be routinely given in cases in which the relation between the substantive offenses charged and the conspiracy charged differs from that in the Pinkerton case itself:

> "We would like to note, however, that the charge based on Pinkerton v. United States, 328 U.S. 640, 645 (1946), here given to the jury by Judge Pollack, should not be given as a matter of course. While no appellants in this case were prejudiced by the charge, it was used here in circumstances quite different from those that gave it birth. In the Pinkerton case, there was no evidence that Daniel Pinkerton had committed the substantive offense for which he had been convicted, but it was clear that the offense had been committed in furtherance of an unlawful conspiracy of which he was a member. Daniel's conviction on the substantive count was sustained because 'in the law of conspiracy . . . the overt act of one partner in crime is attributable to

> all.' Id. at 647. In this case, however, the inverse is at work. The evidence of various substantive offenses, many discrete instances of which are charged to individual appellants in Counts Two throught Eleven, was great; it was the conspiracy that in some instances must be inferred largely from the series of criminal offenses committed." 506 F.2d at 1341-1342.

It is submitted that the evidence against the appellant Corr in this case was precisely in the state that the Court described in Sperling. The government produced evidence allegedly demonstrating that Corr had committed numerous sub-substantive offenses - unregistered sales of securities, stock fraud, mail fraud, making false statements to obtain a bank loan, perjury, and making false statements before the SEC - in pursuit of his alleged goal of controlling the market in Judo securities. The government contended that while Corr had committed numerous substantive offences, he was unable by himself to control the market in Judo stock, and was thus required to enlist certain brokers and registered representatives in an illegal conspiracy to attain his goal. The jury, as in Sperling was thus asked to infer "a conspiracy largely from the series of criminal offenses committed."

Furthermore Corr, unlike the appellants in Sperling, was prejudiced by the giving of the Pinkerton charge. While evidence against Corr was produced on many substantive counts, as to other substantive counts the jury apparently could only have convicted on the basis of the agency theory in the

Pinkerton charge. For example, counts twenty-nine and thirty charged a violation of 18 U.S.C. §1341 in connection with the alleged placing of "wooden tickets" by co-defendant Roger Drayer. Roger Drayer did not testify at the trial. Corr's uncontradicted testimony was that he did not participate in or have any prior knowledge of the alleged placing of the wooden tickets (Tr. 3848-3851). Similarly, count twenty-seven relates to the alleged "parking" of stock by co-defendant William Murphy at the request of co-defendant Bruce Buschbaum (Tr. 1845-1847). Both Buschbaum (Tr. 575) and Murphy (Tr. 1854) testified that Corr had no involvement in this transaction.

While counts twenty-seven, twenty-nine and thirty are particularly clear examples of how the giving of the Pinkerton charge was prejudicial to the appellant Corr, it is submitted that the error in giving this charge requires a new trial on all of the securities and mail fraud counts that were submitted to the jury (counts 11-17, 19, 21-25 and 27-33). All of the allegedly fraudulent transactions involved in these counts necessarily required the participation of a co-defendant broker, and it is impossible to say in the case of any one of these counts that were the Pinkerton charge not given, Corr would still have been convicted.

Thus, in the instant case the Pinkerton charge was both unnecessary and prejudicial. As one commentator has stated:

> "Even if there is a strong need for an attack on organized crime, the imposition of a penalty for conspiracy seems adequate to cope with this need, and it seems unjust to hold every member of a conspiracy equally culpable for a substantive offense regardless of the magnitude of his contribution to its commission. Furthermore, the argument in favor of Pinkerton does not give sufficient weight to dangers inherent in making conspiracy itself a basis of substantive liability. Under Pinkerton, the undesirable laxity which permits a prosecutor to establish membership in a conspiracy solely by means of a network of circumstantial evidence through testimony inadmissible under normal evidentiary rules is injected also into the trial of substantive offenders." Developments in the Law - Criminal Conspiracy, 72 Harv.L.Rev. 920, 999-1000 (1959) (footnotes omitted).

The Pinkerton charge should then, as this Court has stated, not be routinely given. It is submitted that it was reversible error so to charge in the instant case.

B. Marshaling the Evidence

Appellant Corr argued that under United States v. Kahaner 317 F.2d 459, 479 n. 12 (2d Cir. 1963), cert. denied 375 U.S. 835, 836 (1963) the instant case was not an appropriate one for the trial judge to marshall the evidence (324a-330a). In Kahaner, Judge Friendly stated that this Court could not "but wonder whether, in a case like this, with a single count indictment and after three days of pointed but fair summations by capable counsel, much was accomplished through another, and necessarily more compressed, summary by the judge." (375 F.2d at 479-480, n. 12).

While the instant proceeding involved multiple count indictments, all counsel summarized their cases at great length particularly directing their attention to their respective contentions of fact. (The prosecution's initial summation occupied ninety pages of the transcript (Tr. 4936-5025); its rebuttal summation occupied forty additional pages (Tr. 5225-5264). The summation on behalf of the appellant Corr occupied 137 pages (Tr. 5075-5212); that of co-defendant Barry Drayer twenty-seven pages (Tr. 5026-5062); and that of co-defendant Roger Drayer thirteen pages (Tr. 5062-5074).)

The trial judge while acknowledging that counsel could be expected to bring to the jury's attention all relevant evidence supporting their contentions stated that he felt required by the decision of this Court in United States v. Kelly, 349 F.2d 720, 757 (2d Cir. 1965), cert. denied 384 U.S. 947 (1966) to provide the jury with his own summation of the evidence (328a-329a). In Kelly this Court was concerned with possible prejudice to one defendant (Shuck) resulting from a joint trial with other defendants (Kelly and Hagen) against whom the evidence of participation in a conspiracy to defraud was more substantial. The Court in finding reversible error in the trial judge's failure to grant Shuck's motion for a severance stated with regard to marshaling the evidence:

> "In a case such as this one it was particularly important that the proofs be marshalled in such fashion as to place

> clearly before the jury the difference between the evidence against Kelly and Hagen and the evidence against Shuck on the single, over-all conspiracy phase of the case." 349 F.2d at 720

Thus whatever the appropriateness of marshaling the evidence in the instant case with regard to the conspiracy count (compare with Kelly in this regard United States v. Nuccio, 373 F.2d 168, 174 (2d Cir. 1967), cert. denied 392 U.S. 930 (1968)),* the rationale of Kelly cannot be said to require that the trial judge marshall the evidence on the substantive counts. Nevertheless the Court did marshall the evidence on these counts. 34a; Tr. 5358 l. 20-5360 l. 3; 5361 l. 18-5364 l. 5; 5384 l. 18-5385 l. 23. As counsel for Corr argued when he requested that the trial judge not marshall the evidence, even a completely accurate and even-handed marshaling would in the circumstances of this case be prejudicial to Corr (325a-326a). The government n presenting its case over a four week period produced over forty witnesses and hundreds of exhibits. In contrast, Corr's defense occupied only three days and consisted of four witnesses. As noted above, the prosecution was given ample opportunity to fully summarize its extensive presentation of evidence. The marshaling by the trial judge was necessarily heavily weighted in favor of evidence presented by the government and in effect amounted to a "second summation" of the prosecution's case against Corr.

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* Counsel for co-defendant Roger Drayer requested that the trial judge summarize the evidence (331a). Counsel for co-defendant Barry Drayer joined in the request by counsel for Corr that the trial judge not summarize the evidence (330a).

In the present case, the prejudice to Corr in the marshaling by the trial judge was not counterbalanced by any benefits from the marshaling. As discussed above, the jury was fully informed by the summations by counsel of the evidence supporting their contentions. As to the substantive counts, the marshaling by the trial judge did not perform the function of preventing prejudice to co-defendants that concerned this Court in Kelly. Thus it is submitted that as to the substantive counts the marshaling by the trial judge constituted reversible error requiring a new trial.

POINT V

EVIDENCE RELATING TO ALLEGEDLY "SIMILAR ACTS" BY CORR SHOULD HAVE BEEN EXCLUDED

The admissibility of evidence of "other crimes, wrongs, or acts" is governed by Fed. R. Evid. 404(b) which provides:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

The accompanying Advisory Note states in relevant part:

> "The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403."

In the case of the allegedly similar acts discussed below, the following factors should enter into the balancing of the danger of undue prejudice against the probative value of the evidence offered: (1) the burden is on the prosecution to demonstrate probative value (2 Weinstein's Evidence ¶404[08], p. 404-42); (2) none of the allegedly similar acts resulted in criminal convictions or administrative findings of wrongdoing -- the probative valuue of this evidence was thus diminished (id. ¶404 [09] p. 404-46); (3) the government possessed ample additional evidence against Corr ("The incremental value of other crimes evidence on the intent proposition may vary from being almost de minimis to being critical. Where the incremental value is slight, and the possibility of prejudice through misuse by the jury great, the court has power to exclude under Rule 403."* id. ¶404[10] at 404-68). It is submitted that in view of these considerations and of the limited probative value of the particular evidence offered, it was error to admit the "similar act " evidence. As Judge Friendly stated in United States v. Kahaner, 317 F.2d 459, 471-472 (2d Cir. 1963) cert. denied, 375 U.S. 835, 836 (1963):

> "[T]he trial judge should, in an exercise of sound discretion, exclude evidence tending to show the commission of other crimes 'where the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it.' State v. Goebel, 36 Wash.2d 367, 218 P.2d 300, 306. . . ."

* See addendum.

We turn to a discussion of the particular "similar acts" of which evidence was offered.

A. Transactions in American Agronomics Stock

The prosecutor was allowed to question Corr's half brother Joseph Sonberg ("Sonberg") regarding transactions by Sonberg, Corr, and Corr's wife in stock of American Agronomics Corp. ("American Agronomics") (127a-128a). The purpose of this questioning was clearly to bring in through the backdoor additional acts in connection with another security allegedly similar to those involved in the present case. Thus the prosecutor's questioning was directed to establishing that Corr had used a sham account in Sonberg's name to purchase stock in American Agronomics in an attempt to gain control of trading in that corporation's stock. This was one of the means by which Corr allegedly had attempted to manipulate the price of Judo securities.

Corr's transactions in American Agronomics stock were entirely unrelated to his transactions in Judo stock and are the subject of a consent decree entered into by Corr with the SEC. The government nowhere alleged before trial that such highly prejudicial material would be inquired into. In making such inquiries of Sonberg, the prosecutor well knew that a full explanation of the defendant Corr's transactions in American Agronomics stock would be a task equal in complexity to elucidating the transactions in Judo, assuming the trial judge would not rule

such evidence when presented by the defense irrelevant. It is submitted that evidence of Corr's transactions in American Agronomics while of no probative value in the present case was highly prejudicial to him, and thus could not properly be admitted under Rule 404(b).

B. The CBWL-Hayden Stone "Wooden Ticket"

The government alleged (indictment 75 Cr. 803(EW), Count One, par. 4 (m)) that among the means by which the conspiracy was carried out was the placing by Corr and co-defendant Roger Drayer in October and November 1972 of "wooden tickets" - orders that could not and were not in fact paid for - for Judo stock at various brokerage firms. The evidence produced at trial linking Corr to the five wooden tickets alleged in the indictment was tenuous at best. As to the wooden tickets allegedly placed at H. Hentz & Co., Inc., Dominick & Dominick, Inc., and Merrill Lynch, Pierce, Fenner & Smith, Inc., Corr's testimony that he had no prior knowledge of or connection with the placing of these orders was uncontradicted. As to the Sterling, Grace & Co., Inc. wooden ticket, no evidence was produced that a "wooden ticket" was ever placed at the firm. Rather the evidence adduced entirely supported Corr's contention that any unpaid for orders in his account at Sterling Grace were unauthorized orders placed by co-defendant R. Bruce Buschbaum, a Sterling Grace employee.

Only as to the alleged wooden ticket at Margolis & Co., Inc. was evidence produced linking Corr to the order.

The pricipal of Margolis & Co., Inc., Sam Margolis, testified that Corr had placed the order and subsequently refused to pay for it (Tr. 1774-1777). Corr contended that the order was an unauthorized one which Margolis tried to pressure him into accepting (Tr. 3886 - 3890). The cross-examination of Margolis lent support to Corr's position (Tr. 1805-1817; see also Tr. 5174-5175).

Thus even viewing the evidence most favorably to the prosecution no evidence of systematic placing of wooden tickets by Corr to support the price of Judo stock was produced. However, even assuming that Corr's involvement with the wooden tickets charged in the indictment was demonstrated, the wooden ticket allegedly placed at CBWL-Hayden Stone, Inc. was placed under completely dissimilar circumstances, and thus could be of no probative value in establishing Corr's connection with the earlier wooden tickets.

Testimony that Corr placed the CBWL-Hayden Stone wooden ticket was given by the government witnesses Daniel Salant (145a-151a) and Richard Sobel (168a-172a). See pp. 29-32 supra. Salant and Sobel contended that Corr had placed an order for Judo stock for the account of Dr. Lester Van Ess (see pp. 11-12 supra) which was not paid for. Apparently the order in question was placed in May 1973 (145a, 169a). (Sobel placed the date of the transaction as May 14, 1973 by which time trading in the stock had been suspended for four days (169a).)

However the alleged purpose of the placing of the wooden tickets was to support the price of Judo stock when it began to drop (Indictment 75 Cr. 803 (EW), Count One, par. 4 (m)). In April and May 1973 in contrast to October and November 1972 (when the other alleged wooden tickets were placed), the price of Judo stock had been rising (Defendant Corr's exhibit BC). Thus the link between the wooden ticket and the goal of the conspiracy present in the case of the wooden tickets alleged in the indictment was lacking in the case of the CBWL-Hayden Stone wooden ticket. Thus it is submitted that evidence regarding the CBWL-Hayden Stone wooden ticket was of no probative value to the government's case, was highly prejudicial to Corr, and should not have been admitted.

C. The Chase Manhattan Loan

The prosecutor on cross-examination of Corr adduced testimony relating to an allegedly false loan application filed by him at the Chase Manhattan Bank on May 26, 1973 (255a-267a). The Chase Manhattan application was alleged to be an act similar to the false loan application which was the subject of count thirty-four of indictment 75 Cr. 803 (EW). The trial judge sustained the objection by counsel for Corr to the government's offer of the actual loan application on the ground that the application contained a reference to an attachment which was not offered (266a). The trial judge then terminated further questioning on the subject of the Chase Manhattan loan (267a).

Without the actual loan application as evidence of the false statements allegedly made, the entire line of questioning

regarding the Chase Manhattan loan was clearly irrelevant and of no probative value to the government's case on count thirty-four. Yet at the time the application was excluded and questioning terminated, the prosecution had already been allowed extensive highly prejudicial inquiry on the subject (261a-267a). The jury was clearly left with the impression despite the exclusion of the actual application that Corr had filed an additional false loan application in 1973.

As discussed above (pp. 26-29), the allegedly false application was a key test of Corr's credibility, and in these circumstances, the allowance of questioning regarding a similar application where the application itself was excluded as evidence was prejudicial error requiring a new trial.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that a judgment of acquittal should be directed with respect to counts two through nine of indictment 75 Cr. 803 (EW) and counts four, six, seven, and ten of indictment 75 Cr. 1059 (EW) and that a new trial be ordered with respect to all remaining open counts of indictment 75 Cr. 803 (EW) and of indictment 75 Cr. 1059 (EW).

Respectfully submitted,

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ADDENDUM

A. 17 C.F.R. §230.405(f)

> The term "control" (including the terms "controlling", "controlled by" and "under common control with") means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract or otherwise.

B. Federal Rules of Evidence, Rule 403

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

A 202 Affidavit of Personal Service of Papers

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LUTZ APPELLATE PRINTERS, INC.

UNITED STATES OF AMERICA,
Plaintiff - appellee

- against -

JAMES E. CARR III
Defendant - appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, James A. Steele, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
310 West 146th Street, New York, New York
That on the 9th *day of* June 19 76 *at* 1) 275 Madison Avenue, New York, New York
2) 1 St. Andrews Plaza, New York, New York
deponent served the annexed ~~Appendix~~ Brief *upon*
1) Joan Goldberg
2) Ira Lee Sorkin Assistant U.S. Attorney
the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the* *herein.*

Sworn to before me, this 9th
day of June *19* 76

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977

James A. Steele
JAMES A. STEELE